United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7304

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P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter of Arbitration

between

STEPHEN E. BRESSETTE, etc.,

Appellant,

—and—

INTERNATIONAL TALC CO., INC., *et al.*,

Appellees.

ON APPEAL OF A JUDGMENT AND FINAL ORDER FROM THE FEDERAL DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK, HON. EDMUND PORT, PRESIDING

BRIEF FOR APPELLEES

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IN THE

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Docket No. 75-7304

IN THE MATTER OF ARBITRATION

between

STEPHEN E. BRESSETTE, etc.,

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-and-

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Appellees.

On Appeal of a Judgment and Final Order from the Federal District Court, Northern District of New York, Hon. Edmund Port, Presiding.

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Appellant, hereinafter called "Union", petitioned in District Court for the Northern District of New York to compel Appellee, herein-

after called "Company", to arbitrate in the manner provided for in the Collective Bargaining Agreement between the Union and the Company. The action was brought March 10, 1975 pursuant to 9 USC §4 (U. S. Arbitration Act) and 29 USC § 185 (§ 301 Labor Management Relations Act).

II. COURSE OF PROCEEDINGS AND DISPOSITION

The matter came on to be heard April 14, 1975 before Hon. Edmund Port in Syracuse and the Court on the same date dismissed the petition (A 95-96).

An Order of Dismissal (A 4) was entered in the Office of the District Court Clerk April 18, 1975.

From this Order and Judgment the Union appeals.

III. STATEMENT OF FACTS

International Talc Company, Inc. and St. Lawrence Liquidating Corp. were one and the same single New York business corporate entity. There was a Collective Bargaining Agreement between the Union and the Company dated 1 August 1973 - 31 July 1974 (A 11-35). This Company conducted talc mining and grinding operations in the St. Lawrence County area of New York State.

On May 22, 1974 the Company adopted a Plan of Complete Liquidation and Dissolution and ceased all operations effective May 23,

1974. On the latter date the Company conveyed and sold all of its assets, except two hydro electric power plants with appurtenant water rights, to a separate and unrelated purchaser. Such purchaser is not a party to this proceeding. Announcement of sale and termination of all operations was made known to all employees, including Union, on May 23, 1974 (A 37). On July 29, 1974 a Notice of Dispute dated July 26, 1974 was served on the Company (A 36). This was the only written notice ever served or delivered by the Union to the Company in relation to the labor contract of August 1, 1973. After receipt of the July 26, 1974 Notice, a meeting was held on August 29, 1974 between Union officers, attorney and Bargaining Agent with Company officers and attorney. At that meeting a five-page written management proposal was read, discussed, analyzed and delivered to the Union officers and attorney. No objection to such proposal was ever made by the Union to the Company either orally or in writing (A 42). Beginning in October 1974 the Company commenced implementing the proposals outlined at the August 29, 1974 meeting.

About December 11, 1974 the Union by its attorneys filed a charge of unfair labor practices alleging a violation of 29 USC § 158 (a), subsections 1, 3 and 5 (§ 8 (a), subsections (1), (3) and (5) of the National Labor Relations Act). After lengthy hearings, the Regional Director on January 24, 1975 refused to issue a complaint (A 42),

finding that the Company did not unlawfully refuse to bargain over its decision to terminate its plants' operation, sale of its assets, the effects of such decision on its employees, or that it discriminated against its employees in regard to job tenure. There was also a further finding that the Company proposals made at the August 29, 1974 meeting were not protested by the Union and that all employees were notified of termination due to sale of the operation. From this proceeding and decision of the Regional Director (Case No. 3-CA-5906) the Union appealed and the decision was affirmed by the Office of General Counsel NLRB.

Separate from the collective bargaining agreement upon which the Union proceeds herein is a Pension Plan (A 48-73) which provides in part (A 70):

> "The provisions of this Plan, and the meaning, application or performance hereof, shall not be subject to the grievance and arbitration provisions of the Labor Agreement or of any other labor agreements hereafter in effect between the Company and the Union."

Simultaneously with the Notice of Dispute under the Collective Bargaining Agreement there separately was served a Notice of Pension Dispute. A Motion to Stay Arbitration in the Pension Dispute made in State Court resulted in a holding that it appeared both parties consider

the Notice insufficient to start the arbitration process and the demand could be deemed withdrawn (A 47).

ARGUMENT

POINT I.

THERE IS NO ARBITRABLE DISPUTE

The record is replete with uncontroverted evidence that the Company has completely terminated all operations, sold its physical assets and gone out of business in a manner which in no way discriminated against any employee (A 42-46, 88, 94). When the Union elected on December 11, 1974 to file charges of unfair labor practices under § 8 (a), subsections (1), (3) and (5) of the National Labor Relations Act, in lieu of the present LMRA § 301 proceeding, the findings in the prior proceeding should be res adjudicata here. The Company does not contend that refusal to issue an unfair labor complaint precludes bringing the present proceeding. However, it does urge that the following matters were decided:

(a) There was a complete termination of operations.

(b) There was a sale of the Company's physical assets.

(c) There was no discrimination against any employee in regard to job tenure.

(d) That benefits were paid by the Company without objection or protest by the Union.

Kheel in Volume 18 E "Business Organizations (Labor Law)", § 26.03 [5] comments:

> "The fact that the conduct or activity alleged as the basis for a Section 301 action also constitutes an unfair labor practice subject to NLRB jurisdiction does not preclude judicial enforcement; the remedies are not exclusive but supplementary to one another. There is some uncertainty, however, whether the refusal of the General Counsel to issue an unfair labor practice complaint may constitute either collateral estoppel or res judicata in a subsequent Section 301 action. The better rule seems to give considerable, if not binding, effect to such refusal." (And Footnotes thereunder.)

A. An Employer May Terminate Its Business At Any Time

Absent discriminatory intent, an employer exercising management prerogative has the right to terminate his business whether or not it is a sound business decision. Complete termination of business was involved in Textile Workers Union v. Darlington Manufacturing (1965), 380 US 263, 85 S. Ct. 994. There the Court said:

> "[8-10] The AFL CIO suggests in its amicus brief that Darlington's action was similar to a discriminatory lockout which is prohibited

'because designed to frustrate organizational efforts, to destroy or undermine bargaining representation, or to evade the duty to bargain.' One of the purposes of the Labor Relations Act is to prohibit the discriminatory use of economic weapons in an effort to obtain future benefits. The discriminatory lockout designed to destroy a union, like a 'runaway shop,' is a lever which has been used to discourage collective employee activities in the future. But a complete liquidation of a business yields no such future benefit for the employer if the termination is bona fide. It may be motivated more by spite against the union than by business reasons, but it is not the type of discrimination which is prohibited by the Act. The personal satisfaction that such an employer may derive from standing on his beliefs and the mere possibility that other employers will follow his example are surely too remote to be considered dangers at which the labor statutes were aimed."

[380 US 263, 271-272]

The instant case has no such harsh application as in Darlington. There is not a scintilla of discrimination against any employee and the Regional Director of NLRB has so found and the Appeals Office affirmed. The Company never refused to recognize, meet and deal with the Union at any time before or after closing down. The Company has made known its position in writing, and voluntarily provided and paid for substantial additional pension benefits. The Union never took any position other than to claim a breach of contract.

The case of Fraser v. Magic Chef-Food Giant Markets, Inc., (1963) 324 F. 2d 853, Sixth Circuit, involved the duty of an employer to continue operating during the unexpired term of a bargaining agreement. In that case the employer closed one plant and moved its operations to another location. The contract was silent as to management's right to discontinue business. There the Court said:

> "[4] Article XXII is the duration clause of the agreement. The significance of it is that so long as an employer-employee relationship exists, the rights and obligations of the parties are governed by it.
>
> "[5] The appellant seeks to fortify his position by Article XXI of the contract which reads in part: 'Changes in economic conditions or other unforeseen contingencies may cause either the Union or the Company to desire modification in this agreement. ***' We cannot read into this clause any obligation on the part of the Company to continue in business. As the trial judge said: 'It would seem elementary draftsmanship to state in very clear terms any provision whose operation would depart so radically from common practice as the interpretation which the plaintiff urges here.'
>
> "The question then arises as to whether the collective bargaining agreement, which is the subject of this action, is a contract of employment. In J. I. Case Co. v. N. L. R. B., 321 U. S. 332, at p. 334, 64 S. Ct. 576, at p. 579, 88 L. Ed. 762, the Court said: 'Contract in labor law is a term the implications of which must be determined from the connection in which

it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment.

"[6] Rights of employees under a collective bargaining agreement presuppose an employer-employee relationship. A collective bargaining agreement, in ordinary usage and terminology, does not create an employer-employee relationship nor does it guarantee the continuance of one. Employees' rights under such a contract do not survive a discontinuance of business and a termination of operations. See Local Lodge 2040, I. A. M. v. Servel, Inc., 268 F. 2d 692, C. A. 7, cert. den., 361 U. S. 884, 80 S. Ct. 155, 4 L. Ed. 2d 120, Oddie v. Ross Gear & Tool Co., 305 F. 2d 143, C. A. 6, cert. den., 371 U. S. 941, 83 S. Ct. 318, 9 L. Ed. 2d 275; Elder v. New York Central R. Co., 152 F. 2d 261, C. A. 6; United States Steel Corp. v. Nicholas, 229 F. 2d 296, 56 A. L. R. 2d 980, C. A. 6., cert. den., 351 U. S. 950, 76 S. Ct. 846, 100 L. Ed. 1474."

[Fraser v. Magic Chef-Food Giant Markets, Inc. Supra 355]

While the foregoing case is that of an individual against an employer, distinct from the present case of a Union demand for arbitration, it is respectfully suggested that it is more relevant and material

than the cited Union cases which deal mainly with either continuing operations or successor employers having assumed, willingly or not, the obligations of a predecessor by reason of stock purchases and statutory mergers. See also Schneider v. Electric Auto-Lite Company, (1972) 456 F. 2d 366, Sixth Circuit.

B. There Is No Identifiable Issue to be Arbitrated

The July 26, 1974 Notice (A 36) does not specify any controverted part of the labor agreement to be decided within the arbitration process. To compel this employer to arbitrate more particulars should be required than the conclusory statement that the Company has violated the Collective Bargaining Agreement. It is not ascertainable what the Union wants arbitrated. In the proceedings below the Union admitted that pension benefits were the main issue but did not identify the benefits claimed.

> "Minutes of Proceedings, held on 4-14-75.
>
> * * * * * *
>
> "MR. BLITMAN: Also there would be section 11 (a), Your Honor, which is found on page 18 of the contract. My portion of the xerox copy is not very clear. We can supply a readable copy to the court.
>
> "In addition to that, there is a question with reference to pension benefits, which may be due employees.
>
> "THE COURT: That is clearly raised, the pension question.

"MR. BLITMAN: Yes, that is really the gist of the matter between the parties, and I would respectfully call your attention to the fact it is mentioned in the contract.

"THE COURT: All right, so I think what it really boils down to are the rights under the pension agreement.

"MR. BLITMAN: That is the essence of the petitioner's claim here, although quite frankly, Your Honor, I wouldn't want the petitioner to be foreclosed from raising any other contractural rights is may want to."

(A 81-82)

The exclusionary clause in the Pension Agreement (A 70) in clear and unambiguous terms overcomes the "imposing litany" mentioned by this Court in the case of a temporary shut-down. This Court said in International Association of Machinists and Aerospace Workers v. General Electric Company (1969) 406 F. 2d 1046, Second Circuit:

"[1-5] To resolve the issue of arbitrability, there is no need to rehearse the applicable law here at length; we have done so in the recent past. See, e. g., IUE v. General Electric Co., 407 F. 2d 253 (2d Cir. 1968); ILA v. New York Shipping Ass'n, 403 F. 2d 807 (2d Cir. 1968). It is enough to say that the authorities there quoted teach us that it is 'national policy' to encourage arbitration of labor disputes, that doubts as to arbitrability should be 'resolved in favor of coverage,' that language excluding

> certain disputes from arbitration must be 'clear and unambiguous' or 'unmistakably clear,' and that arbitration should be ordered 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' This is an imposing litany for the Company to overcome. * * *"
>
> [International Association of Machisists and Aerospace Workers, AFL CIO, et al v. General Electric Company
> 406 F. 2d 1046, 1048]

The foregoing case is that of a continuing business entity temporarily shutting down part of an operation. Here there was a complete termination of all business; there is no survivor and the company was in process of complete liquidation. The July 26, 1974 letter (A 36) made no claim of "lock-out," "contracting out of work," "new position created," "vacation loss," nor refusal to meet with the Union. There has been no failure to discuss and explain the termination and its consequent effects (A 42). In any event, such matters were decided in favor of the Company in the NLRB hearings.

No specific written claim or demand has been made. The Union never seriously pursued such issues, and there is no framework of dispute within which to arbitrate.

C. The Sale of the Physical Assets and Termination of Business Are Not Arbitrable Events

The case of Livingston v. John Wiley & Sons, Inc., 313 F. 2d 52 (2d Cir. 1963), aff'd 376 U. S. 543, involves the successor obligation of a surviving corporation resulting from a statutory merger to arbitrate issues within the collective bargaining agreement of the former or merged corporation. There is no such merger or identity here. There is no continuity of operation nor substantial continuity in the identity of the work force. Indeed, the Court said:

> "[15] We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. As indicated above, there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved. So too, we do not rule out the possibility that a union might abandon its right to arbitration by failing to make its claims known. Neither of these situations is before the Court. Although Wiley was substantially larger than Interscience, relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty. * * * "
>
> [John Wiley & Sons, Inc. v. David Livingston, etc., 376 U. S. 543, 551]

The issues raised by the Union in Wiley were precisely framed and specific. Here there are no issues other than the July 24, 1974 allegation of violation of the Collective Bargaining Agreement. This Notice was further qualified by the statement, " - - - If we cannot reach agreement in this matter, the dispute will be submitted to arbitration pursuant to the agreement. - -" (A 36) What were the matters in dispute? Were all or none or some resolved, settled, accepted, rejected or waived as a result of the August 29, 1974 meeting?

POINT II.

IT IS FOR THE COURT TO DETERMINE WHETHER AN EMPLOYER HAS BREACHED ITS DUTY TO ARBITRATE

The broad arbitration principles propounded in the "Trilogy" are not applicable here. The District Court did not decide the merits of any grievance. Rather it decided that it could not rewrite the Collective Bargaining Agreement to apply its grievance procedure to the Pension Agreement which specifically excluded it (A 96).

The Warrior and Gulf Navigation case involved the arbitrability of the employer contracting out work while continuing to

to operate on a reduced scale. The Court said in United Steelworkers v. Warrier & Gulf Navigation Co., (1960) 363 U. S. 574 at 582, 583:

> "[3-7] The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. * * * "

This Circuit also decided that a court should determine whether a contract imposes a duty to arbitrate. Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co., (1962) 312 F. 2d 181, Second Circuit.

> "[3] The duty to arbitrate is wholly contractual and the courts have the obligation to determine whether there is a contract imposing such a duty.
>
> " 'The Congress * * * has by §301 of the Labor Management Relations Act,

> assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' United Steelworkers v. Warrior & Gulf Co., 363 U. S. 574, 582, 80 S. Ct. 1347, 1352, 4 L. Ed. 2d 1409 (1960).
>
> "Our task is, then to determine whether at the time these grievances arose there was any agreement to arbitrate grievances."
>
> [Page 184]

The entire rationale and concern of the Court in all of the "Trilogy" cases was to promote industrial peace during the term of a continuing collective bargaining agreement by using the arbitration process to decide matters such as: (1) seniority of one employee in a bargaining unit of a continuing operation: United Steelworkers of America v. American Manufacturing Co., (1960) 363 U. S. 564; (2) contracting out work by an employer which continued to operate: United Steelworkers of America v. Warrior and Gulf Navigation, (1960) 363 U. S. 574, and (3) wrongful discharge and refusal to reinstate certain employees within a bargaining unit by an employer continuing to operate: United Steelworkers of America v. Enterprise Wheel & Car Corp., (1960) 363 U. S. 593. These were standard arbitrable issues governing plant operations.

There are no such grievances remotely applicable here.

A. There Has Been No Breach of Agreement to Arbitrate Any Grievance

The case of International Association of Machinists v. Howmet Corporation, 466 F. 2d 1249, Ninth Circuit (1972) is readily distinguished. There the Court held Menasco as a successor employer which assumed a labor contract was required to arbitrate the effects of a plant closing after having taken over the operation. That was only one of many plants. Menasco was the purchaser. There is no purchaser a party here. The seller, Howmet, was not required to arbitrate any grievance and the District Court granted summary judgment in favor of Howmet (the seller) against the Union, and the Circuit Court did not disturb this finding.

The Union has tendered no grievance subject to the arbitration format of the bargaining agreement.

B. There is No Continuing Duty toArbitrate Grievances Plainly Referrable to an Operating Company

There is no relevancy of the present case to the successorship cases cited by the Union, e. g., Howard Johnson Co. v. Detroit Local Joint Exec. Board, (1974) 417 U. S. 249; John Wiley & Sons, Inc. v. Livingston, (1964) 376 U. S. 543. See also Boeing v. International Assn. of Machinists & Aerospace Workers, (1974) 504 F. 2d 307, Fifth Circuit. (Cert. Denied.)

In the Howard Johnson case the predecessor employer was an operating company that survived the sale of part of its assets. The predecessor continued as a business entity and did not dissolve as here. The Court observed:

> "[1, 3] We find it unnecessary, however, to decide in the circumstances of this case whether there is any irreconcilable conflict between Wiley and Burns. We believe that even on its own terms, Wiley does not support the decision of the courts below. The Court in Burns, recognized that its decision 'turn[ed] to a great extent on the precise facts involved here.' 406 US, at 274, 32 L Ed 2d 61. The same observation could have been made in Wiley, as indeed it could be made in this case. In our development of the federal common law under § 301, we must necessarily proceed cautiously, in the traditional case-by-case approach of the common law. Particularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate. The Court was obviously well aware of this in Wiley, as its guarded, almost tentative statement of its holding amply demonstrates."
>
> [Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board 417 U. S. 249, 256]

Compare NLRB v. Burns International Security Services, 406 U. S. 272 (1972), 92 S. Ct. 1571; Boeing v. International Assn. of Machinists & Aerospace Workers, (1974) 504 F. 2d 307, Fifth Circuit.

In the present case, this employer completely shut down all operations, sold and transferred all assets, paid pension benefits in excess of those required by purchase of insurance annuities for all eligible pensioners and dissolved.

C. The Termination of a Collective Bargaining Agreement is a Matter to be Decided by the Court and Not by an Arbitrator

The agreement here in issue provided for a grievance procedure but it did not provide that the parties would arbitrate the issue of contract termination. In fact, once the operation was closed, the grievance procedure could not be followed (A 22-23). The grievance mechanism is plainly referrable to steps to be taken while the employer is an operating entity.

In any event the arbitration clause does not specifically cover contract termination. In such instance it is for the Court to decide the issue of termination. International Union, U.A.A. & A.I. Workers v. Interrational Telephone & Telegraph, (1975) 508 F. 2d 1309, Eighth Circuit. There the Court said at pages 1313 and 1314:

> "For example, in the following cases, the facts indicate a genuine ambiguity in the language involved, yet the courts in each case ruled that the issue of contract expiration or termination should be resolved judicially. Oil, Chemical

& Atomic Workers Local 7-210 v. American Maize Products Co., 492 F. 2d 409 (7th Cir.)., cert. denied, 417 U. S. 969, 94 S. Ct. 3173, 41 L. Ed. 2d 1140 (1974); International Ladies' Garment Workers' Union v. Ashland Industries, 488 F. 2d 641 (5th Cir. 1974); United Auto Workers Local No. 998 v. B. & T. Metals Co., 315 F. 2d 432 (6th Cir. 1963); United Mine Workers of America, District 22 v. Roncco, 314 F. 2d 186 (10th Cir. 1963); Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co., 312 F. 2d 181 (2nd Cir. 1962). The language under consideration in two other cases has been characterized as relatively unambiguous and there the courts have also ordered judicial resolution of the issue of contract expiration or termination. Teamsters Local No. 249 v. Kroger Co., 411 F. 2d 1191 (3d Cir. 1969); M. K. &O. Transit Lines, Inc. v. Association of Street, Electric Railway and Motor Coach Employees, 319 F. 2d 488 (10th Cir. 1963."

* * * * * * * * *

"[6] In applying these principles of labor law to the instant case, we hold that the district court erred in submitting the issue of contract termination to the arbitrator. The arbitration clause, although phrased broadly, arises in the context of the grievance procedures and we find no indication in the contract language that the parties ever intended the arbitration clause to apply to the overall issue of contract termination. Moreover, the issue of termination of the bargaining agreement rests on the construction of the January 15, 1973, letter agreement. This letter is a document separate from the bargaining agreement. We find no language in any of the pertinent writings indicating an intention that an arbitrator should interpret the meaning of the January 15 letter. The arbitration clause in the

bargaining agreement specifically confines its effect to the 'interpretation or application of the terms of this agreement.' (Emphasis added).

"Thus, under the facts of this case, the district court should have resolved the issue of contract termination itself and, accordingly, we reverse and remand on this issue."

POINT III.

THE DISTRICT COURT CORRECTLY REFUSED TO ORDER ARBITRATION

There was no evidence before the District Court requiring submission of any matter to arbitration. Despite repeated recitations of general principles favoring arbitration, it still remains for the Court to decide substantively whether this employer breached its agreement with the Union by refusing to arbitrate its decision to terminate all of its operations.

The lower court was fully aware of the limitation and scope of its inquiry. However, it did properly determine that there was a complete termination based upon competent evidence and the testimony elicited by the Union itself at the hearing of April 14, 1975.

"Minutes of Proceedings, held on 4-14-75. Testimony of Frederick Kuehl, Direct by Mr. Duffy.

* * * * * * * *

"THE COURT: Is it the intention of the respondent here to dispose of those plants along with --

"MR. BLITMAN: Well, Your Honor, I respectfully submit that the intention of this witness here would be self serving, and furthermore is not relevant to the proceeding with reference that -- to the facts that occured.

"THE COURT: All right, your objection is noted. Now I will finish my question, is it the intention of the respondent here to dispose of those plants along with other assets, all other assets?

"THE WITNESS: The other assets had been disposed of approximately on May 22, and these plants had not been included in the sale, and we are attempting to sell these to a third party."

[A 89-90]

"Minutes of Proceedings, held on 4-14-75. Testimony of Frederick Kuehl, Cross by Mt. Blitman.

* * * * * * * *

"Q And after the power plants were shut down, Mr. Kuehl, did you ever discuss the closing down of the power plants with the union?

"A. Only that they were closed down and were going to be closed down permanently, and the people were therefore discharged or laid off."

[A 94]

No court could be anything but assured clearly, positively and finally that the Pension Agreement excluded arbitration under the Collective Bargaining Agreement by use of the following language:

> "The provisions of this Plan, and the meaning, application or performance hereof, shall not be subject to the grievance and arbitration provisions of the Labor Agreement or of any other labor agreements hereafter in effect between the Company and the Union."
>
> [A 70]

CONCLUSION

It is respectfully urged that by reason of the foregoing and upon the facts in this case the District Court was perfectly correct in denying the motion to compel arbitration and dismissing the petition. The Judgment and Order should be affirmed in all respects.

Respectfully submitted,

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STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 19th day of Sept 1975, at 11 o'clock A.M. he served the annexed Brief for Appellees in Re: In the Matter of Arbitration between Stephen E. Bressette, etc. and International Talc Co., Inc., et al No. 75-7304

upon Blitman and King

Esq(s)., Attorney(s)

for Appellant

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

500 Chamber Building
351 South Warren Street
Syracuse, New York 13202

that being the address designated in the last papers served herein by the said attorney. Joseph Boselli

Sworn to before me this 19th day of September 19

John Allsick

JOHN ALLSICK
Notary Public, State of New York
No. 31-4502133
Qualified in New York County
Commission Expires March 30, 1976